EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

APPLE INC.,	)	
	)	
----------Plaintiff,	)	
	)	Case No.
vs.	)	22-CV-1377-MN-JLH
	)	
MASIMO CORP, et al.,	)	22-CV-1378-MN-JLH
	)	
----------Defendants.	)	

TRANSCRIPT OF MOTION HEARING

MOTION HEARING had before the Honorable Jennifer L. Hall, U.S.M.J., in Courtroom 2B on the 15th of June, 2023.

APPEARANCES

POTTER ANDERSON & CORROON LLP
BY: DAVID MOORE, ESQ.
BINDU PALAPURA, ESQ.

-and-

DESMARAIS LLP
BY: KERRI-ANN LIMBECK, ESQ.
JORDAN MALZ, ESQ.
JAMIE KRINGSTEIN, ESQ.

-and-

WILMERHALE
BY: JENNIFER MILICI, ESQ.
MARK FORD, ESQ.

Counsel for Plaintiff

(Appearances continued.)

PHILLIPS MCLAUGHLIN & HALL P.A.
BY: JOHN PHILLIPS, ESQ.

-and-

KNOBBE MARTENS
BY: ADAM POWELL, ESQ.
STEVE LARSON, EQ.
BRIAN HORNE, ESQ.

Counsel for Defendants

THE COURT: So we're here today to hear motions in two cases. One is *Apple versus Masimo and Sound United*, and that's 22-CV-1377-JLH. And the other is also *Apple versus Masimo and Sound United.* That's 22-1378.

Let's have appearances starting with Plaintiff.

MR. MOORE: Good morning, Your Honor. David Moore from Potter Anderson on behalf of Apple. I'm joined by my partner Bindu Palapura. We're joined by our co-counsel from Desmarais Kerri-Ann Limbeck, Jordan Malz, and Jamie Kringstein. And from WilmerHale we're joined by Jannifer Milici and Mark Ford. And from Apple, Natalie Poe and Megan Thomas-Kennedy.

THE COURT: Hello. Good morning, everyone.

MR. PHILLIPS: Good morning, Your Honor. Jack Phillips of Phillips, McLaughlin, and Hall. With me in the courtroom are Steve Larson, Brian Horne, and Adam Powell from Knobbe Martens.

THE COURT: Good morning, everyone.

claims about unilateral refusals to deal would be -- would have to go to discovery and would be the subject of litigation and *Trinko* and other case law explains why that shouldn't be. This is unilateral conduct we're talking about, and as you recognize in *Simon* and other cases, there's a chilling effect if we allow claims that don't have a plausible antitrust theory to go forward because they happen to be thrown it. And it encourages plaintiffs to throw in everything they think of no matter how plausible so that they can impose incredible discovery allegations on the defendant.

THE COURT: Understood. And again, I'm thinking out loud here. I think what's challenging for the Court in this particular case given these particular parties and their history of litigation against each other, arguments about burdens of discovery are maybe taken with a degree of skepticism, and I don't -- but I get it. I get what you're saying.

MS. MILICI: If I could just respond to that point because I think we've been engaging in discovery. They served discovery

requests. Some of the requests are asking for things like, basically, every app store review that Apple has ever done based on the thinnest of allegations. That hasn't been the subject of discovery in any litigation between the parties. That's brand new litigation, brand new discovery and not suggested by any of the allegations in the complaint.

I will also say that counsel got up here and talked about this supposed theory they steal trade secrets. That's being litigated in the Central District of California. That cannot be relitigated here. The Central District of California case, when it has a decision, it will be res ajudicata. It's not an antitrust injury anyway, but certainly they don't get a second bite of the apple. Judgment as a matter of law was granted against them in some of the claims by Judge Tilghman, and jurors voted six to one among them on the others until a mistrial was declared. Those issues are going to be decided there. They're not antitrust issues to begin with, but they certainly don't get to come here and repackage then them as antitrust violations and get a

own invalidity contentions to then argue that someone specific actually committed some sort of misconduct that would rise to the heightened pleading standard for inequitable conduct here.

THE COURT: All right. Thank you very much.

If you feel like you need to respond, you can because we did give them some extra time, but there's no requirement.

MR. LARSON: First of all, I really disagree with how you characterize our discovery. We didn't serve any requests remotely like that that I recall. And as Your Honor pointed out, that can be handled on discovery to the extent the requests are too broad.

Second, on particular theories of antitrust, I don't think this is a good forum to decide the economics of our theories because Apple primarily argues bright-line rules. We argued about the bright-line rules. We think to the extent particular theories are going to be addressed, they should be addressed with expert testimony on the economics, if anything in summary judgment, and you should look at the

conduct as a whole, which will be developed at that time.

And third, Apple mentioned that it approved our health app, but that was after we filed a lawsuit, and we mentioned and show in our complaint a repeated pattern, and certainly the fact the Apple eventually allowed the app doesn't undo the harm at the critical moment of our launch, and certainly doesn't undo the harm to competition as a whole.

THE COURT: Just to make sure I understand, sorry, there was a delay in Apple approving on the App Store, but the app is approved now?

MR. LARSON: The app is approved now, but the only thing I would say in our complaint is not just that there was a delay or they refused to approve it, it's a pattern we see where they're seeking confidential information from it, and they use Section 9.3 of the agreement that we discussed in our complaint, which says they can use whatever confidential information they get for whatever purpose. And you see a pattern of trying to get the confidential information. They're directly

competing with the Health Watch product.

THE COURT: I understand we're going outside the pleadings now, but I'm trying to understand what's going on here. You didn't give them the confidential information?

MR. LARSON: We did. We resisted giving them confidential information.

THE COURT: They had it from the other case; right?

MR. LARSON: Depending on what confidential information -- we were very careful about making sure Apple itself did not have it. And like I said, this is not just us. It's also Alive Core. In that case, Alive Core -- Apple was not allowed at all, so there's a pattern here. We think, certainly, it's a part of the overall scheme and part of the overall conduct that we think would be relevant here in providing analysis of.

THE COURT: You all reminded me that I've written a lot about antitrust cases, but I'm still newer to this than I know a lot of you are. Because this is an attempted monopolization claim, is it relevant to intent even though it didn't cause any harm?

MR. LARSON: First of all, it would be relevant to intent, absolutely. Intent is also shown by conduct in antitrust cases, but certainly actual intent, evidence taken during discovery, the actions they engaged in to try to block us would absolutely be relevant.

To clarify, we are also asserting monopolization. Both monopolization and alternative attempt at monopolization, the theory being that even if they don't have market share now for us to assert that they're trying to maintain or bolster the monopoly power, the conduct is such that there's a dangerous probability that if the scheme were successful, they would attain that monopoly power, that market share.

THE COURT: Right. But for the Walker process, that can only be attempted.

MR. LARSON: In the *Garden* case it was both monopolization and attempted monopolization. And in *TransWeb*, it was attempted monopolization, which may be what Your Honor is thinking of. And certainly the theory the harm that will result if the scheme is successful is particularly powerful in the

C E R T I F I C A T E

STATE OF DELAWARE)
) ss:
COUNTY OF NEW CASTLE)

I, Deanna L. Warner, a Certified Shorthand Reporter, do hereby certify that as such Certified Shorthand Reporter, I was present at and reported in Stenotype shorthand the above and foregoing proceedings in Case Number 22-CV-1377-MN-JLH, *APPLE INC. Vs. MASIMO CORP, et al.*, heard on June 15, 2023.

I further certify that a transcript of my shorthand notes was typed and that the foregoing transcript, consisting of 56 typewritten pages, is a true copy of said **MOTION HEARING**.

SIGNED, **OFFICIALLY SEALED**, and **FILED** with the Clerk of the District Court, NEW CASTLE County, Delaware, this 16th day of June, 2023.

Deanna L. Warner, CSR, #1687
Speedbudget Enterprises, LLC